

**John P. Bell & Sons, Inc. and Local Union No. 13, an affiliate of the United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. Case 3-CA-10679**

April 8, 1983

### DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND  
HUNTER

On November 30, 1982, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions, the General Counsel and the Charging Party filed answering briefs, and the Charging Party filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Darcy Farrell because he was designated as union steward. The Administrative Law Judge made no findings concerning the complaint allegation that Farrell also was not hired because he is the Union's business manager's brother. Nevertheless, the Administrative Law Judge recommended that Respondent be ordered to cease and desist from "[r]efusing to hire prospective employees because they are designated as steward or because of their relationship to Union officials." We find nothing in the record to support a conclusion that Respondent discriminated against Farrell because he is related to a union official. Accordingly, we shall modify the recommended Order and substitute a new notice.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, John P. Bell & Sons, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Refusing to hire prospective employees because they are designated as stewards."

2. Substitute the attached notice for that of the Administrative Law Judge.

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to hire prospective employees because they are designated as stewards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer employment to Darcy Farrell in a job he would have received had we not discriminated against him and WE WILL make him whole for any loss of wages or other benefits he may have suffered, plus interest, as a result of our discrimination against him.

JOHN P. BELL & SONS, INC.

### DECISION

#### STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me at Rochester, New York, on July 8 and 9, 1982. Upon a charge filed on October 2, 1981,<sup>1</sup> a complaint was issued on November 13 alleging that John P. Bell & Sons, Inc. (Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses,

<sup>1</sup> All dates refer to 1981 unless otherwise specified.

argue orally, and file briefs. Briefs were filed by all parties.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF RESPONDENT

Respondent, a New York corporation with its principal office and place of business in Rochester, New York, is engaged in the business of construction, pipefitting, and related services. During the 12 months preceding the issuance of the complaint Respondent purchased goods valued in excess of \$50,000 from suppliers located outside New York State. Respondent admits that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and I so find.

##### II. THE LABOR ORGANIZATION INVOLVED

Local Union No. 13, an affiliate of the United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICE

###### A. *The Issue*

The sole issue in this proceeding is whether Respondent refused to hire a prospective employee in violation of Section 8(a)(1) and (3) of the Act because the employee was designated as steward and was the brother of the Union's business manager.

###### B. *The Facts*

###### 1. Background

Respondent has an ongoing maintenance contract at the Ginna Nuclear Power Plant. On September 21 Richard Bell, one of the owners of Respondent and construction manager at Ginna, requested that the Union provide four steamfitters to work at Ginna starting September 28. Joseph Parlet, the Union's business representative, credibly testified that he then selected the four fitters who would be sent to Ginna; namely, Jerry Wickim, Mark Scalzo, John Nelson, and Darcy Farrell (Darcy). Darcy credibly testified that on September 22<sup>2</sup> Chris Farrell, his brother and the Union's business manager, told him that he was selected as one of the four fitters and that he would be steward. In uncontroverted testimony, Darcy credibly testified that on the same day he told three people that he would be going to work at Ginna on September 28 and that he was appointed steward. One of the persons he told was Paul Nolan, general foreman on the job.

Parlet testified that on Friday afternoon, September 25, he received a telephone call from Richard Bell that there may be a problem with the four fitters coming to

work at Ginna on Monday. Bell asked for the names of the four men and Parlet told him the names. Parlet also told him that the men had already been dispatched and that it would be difficult for him to get in touch with them prior to Monday. Bell testified that he called Parlet on Friday to ask who was being assigned to the job. He further testified that later that afternoon he found out that the project would be delayed "a couple of days" and that he then called the Union to cancel the order for the four men.

###### 2. Events of September 28

Darcy testified that he arrived at the Ginna jobsite on September 28 at approximately 8 a.m. He testified that he went to the security class and after about 45 minutes Richard Bell approached him and asked for his referral cards. Darcy testified:

So I showed him the referral card and after he saw that I had on the back of the card I had that I was the job steward, he said, "Well, there has been a mistake." He said, "The call had been cancelled." And he didn't need anybody. Any I said "Well, if you didn't need anybody, how come the other three guys are already working?"

Darcy further testified that after his initial discussion with Bell, at approximately 10:15, George Satter, who was the previous job steward, came into class and "pulled out" the other three pipefitters. Darcy testified that at 12:30 he again spoke to Richard Bell, at which time Bell told him that he wanted Satter to be steward and that "he wasn't going to put me on and he couldn't stop me from going to school, but when I came over to the security gate, he was going to stop me there." In addition, Darcy testified that on September 28 Kohlmaier, another pipefitter, was transferred from a different jobsite to Ginna.

Chris Farrell testified that on September 29, when he was told about the problem with Darcy, he called Joseph Bell, president of Respondent, and asked him "why he wasn't allowing Darcy on the job and he said he felt that there would be a lot of problems with him being the steward." Farrell further testified that Joseph Bell told him that he would "put Darcy Farrell to work on the Ginna job as long as he wasn't a steward." Parlet's testimony generally corroborates that of Chris Farrell. Parlet testified that on September 28 he had a conversation with Richard Bell, during which:

I asked Dick what happened there and why wouldn't he allow Darcy on. And he said that he couldn't have Darcy on the project as steward, that he would cause problems. And I asked him, well, what kind of problems would he cause, and he said I just can't have him out there. There would be a lot of problems. And that he wanted George Satter as a steward.

Satter, another pipefitter, testified that he was called on Sunday night, September 27, to report at the Ginna jobsite the following day. He testified that he was asked

<sup>2</sup> While Darcy initially testified that this took place on September 21, he subsequently testified that it occurred on the fourth Tuesday of September, which was September 22.

by one of the foremen to take Nelson, Scalzo, and Wickim out of class because they had previously received a security clearance which was still in effect. He further testified that there were other pipefitters who went to work on September 28.

Richard Bell's testimony to a large extent is at variance with the testimony of the General Counsel's witnesses. He testified that on September 28 he arrived at the Ginna jobsite at 7:30 a.m. and that between then and 8:15 a.m. he did not see Scalzo, Nelson, Wickim, and Darcy. He further testified that he did not see Darcy in the security class. In this connection, Respondent's Exhibit 2, which is an attendance sheet for the security class, does not list the names of the four men. Bell testified that he spoke to Darcy during the lunch break after the health physics (HP) training class and told Darcy that, "I had cancelled the call for men, that he wasn't needed out here at this project," but that he offered to send him to another project. Bell testified that Darcy showed him the referral card, which indicated that Darcy was to be the steward, after he told Darcy that he had canceled the call for men for that morning. Bell further testified that the reason he canceled the call for the men was because there would be a "delay of a day or two." He conceded, however, that he did not tell Darcy to come back to work on Wednesday, September 30. While Bell initially testified that the only reason he did not hire Darcy was because he "didn't have room for him," on cross-examination he stated that he had a "problem with Darcy Farrell with respect to his being dependable." Bell also testified that he had problems with the dependability of the other three referrals, but the evidence is uncontroverted that the other three men were permitted to work at the jobsite on September 28.

Scalzo testified that on September 28 he arrived with Wickim at 9:15 a.m. He testified that he came into the security class about 10 minutes before the end of the class, did not see the sign-in sheet, and accordingly did not sign it. Scalzo further testified that while he was attending the HP class Satter came in and took Wickim, Nelson, and himself out of the class, telling them that their "training was still good." Scalzo testified that he saw Darcy in the HP class but did not see him in the security class. He further testified that he did pipefitter work on September 28 and 29 and that he was not told by anyone that the work was delayed or that no work was available.

### 3. Concluding findings

I generally credit the testimony of Chris Farrell, Satter, Parlet, Viola, Nelson, and Scalzo. They appeared to be credible witnesses and for the most part, on the essential points, their testimony was corroborated and appears plausible. See *Northridge Knitting Mills*, 223 NLRB 230, 235 (1976); *Gossen Co.*, 254 NLRB 339, 345 (1981). For the same reasons most<sup>3</sup> of Darcy Farrell's testimony also appears credible.<sup>4</sup>

Accordingly, I find that on September 22 Darcy Farrell was told to report to work at Ginna on September

28 and that he would be steward. On the same day he told Nolan that he would be steward at which time Nolan advised him that he, in turn, would be general foreman. On September 25 Richard Bell called Parlet to ask the names of the four men who had been referred. After being informed of the names, Bell called again that afternoon to say that there had been a delay in the work and he requested that the four men be canceled. Parlet advised Bell that it was too late to cancel the order for the four men.

Sometime after the security class on September 28,<sup>5</sup> Darcy had a conversation with Richard Bell at which time Bell asked to see Darcy's referral card. After seeing the card, which indicated that Darcy was steward, Bell advised Darcy that the call for the men was canceled. The other three referrals worked that day, doing pipefitting work. In addition, on September 28 Satter and Kohlmaier were transferred from other jobs to Ginna to do pipefitting work.

At approximately 12:30 on September 28 Darcy had another conversation with Richard Bell. Bell told Darcy that he wanted Satter to be steward. On the same day Parlet had a conversation with Richard Bell, at which time Bell said that Darcy could not serve as a steward because it would cause problems but that Darcy could have another job. On the following day Chris Farrell had a conversation with Joseph Bell who similarly stated that there would be problems with Darcy as steward but that Darcy could have a job so long as he was not steward.

### C. Discussion

I have found that Nolan, the general foreman on the job, was notified on September 22 that Darcy Farrell would be the steward. I have further found that on September 28 Richard Bell, after seeing Darcy's referral card, told him that there was no work for him at that jobsite. I have also credited the testimony of Chris Farrell that Joseph Bell told him that there would be a lot of problems with Darcy as steward and that Respondent would be willing to put Darcy on the job so long as he would not be steward. In addition, I have credited Parlet's testimony that Richard Bell told him that he could not have Darcy on the job as steward because it would cause problems, but that Darcy could have another job. It is evident that Darcy was refused employment because he was designated to be the steward. Respondent's con-

<sup>3</sup> A trier of facts is not required to discount everything a witness testifies to because he does not believe all of it. "Nothing is more common than to believe some and not all of what a witness says." *Edwards Transportation Co.*, 187 NLRB 3, 4 (1970), *enfd. per curiam* 449 F.2d 155 (5th Cir. 1971); *Gossen Co.*, *supra* at 347.

<sup>4</sup> Richard Bell did not appear to me to be a credible witness. Initially he stated that he had no work for Darcy on September 28. He subsequently testified, however, that Darcy was not dependable. He then testified that Scalzo, Wickim, and Nelson were also not dependable, yet they were hired.

<sup>5</sup> While Darcy testified that he arrived at 8 a.m., the attendance sheet at the security class does not show that he was present. Both Richard Bell and Mark Scalzo testified that they did not see Darcy in the security class. Nelson testified that the room was dark, inasmuch as a movie was being shown. It is possible that Darcy came into the class sometime after the attendance sheet was passed around.

tention that there was no work for Darcy is clearly pretextual. The other three fitters were employed on September 28 in addition to Satter's and Kohlmaier's being transferred to work as fitters at Ginna. Furthermore, Richard Bell's belated testimony that Darcy was not hired because he was not a dependable worker is added evidence of the pretextual nature of the alleged reason for the refusal to hire. Richard Bell testified that the other three fitters also were not dependable, yet they were hired. See *F. & M. Importing Co.*, 237 NLRB 628, 632 (1978); *Grede Foundries*, 211 NLRB 710, 711-712 (1974).

Accordingly, I find that Respondent refused to hire Darcy Farrell because he was designated as steward.<sup>6</sup> This constitutes a violation of Section 8(a)(1) and (3) of the Act. See *Kern's Bakeries*, *supra*; *Copes-Vulcan, Inc.*, 237 NLRB 1253, 1257 (1978), *enfd.* in pertinent part 611 F.2d 440 (3d Cir. 1979).

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By refusing to hire Darcy Farrell because he was designated to be union steward, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.
4. The aforesaid unfair labor practice constitutes an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in an unfair labor practice I find it necessary to order Respondent to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act. Respondent will be ordered to offer employment to Darcy Farrell and to make him whole for wages and other benefits he may have lost as a result of the discrimination against him in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with

<sup>6</sup> If a trier of facts finds that an employer's stated motive for an action, such as a discharge or a refusal to hire, is false, he can infer that there is another concealed motive for such action. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Daniel Construction Co.*, 229 NLRB 93, 95 (1977); *Kern's Bakeries*, 227 NLRB 1329, 1332 (1977).

interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>7</sup>

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>8</sup>

The Respondent, John P. Bell & Sons, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
  - (a) Refusing to hire prospective employees because they are designated as steward or because of their relationship to union officials.
  - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
  - (a) Offer Darcy Farrell immediate employment.
  - (b) Make whole Darcy Farrell for any loss he may have suffered as a result of the discrimination against him in the manner set forth in the section above entitled "The Remedy."
  - (c) Post at its facility in Rochester, New York, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.
  - (d) Notify the Regional Director for Region 3, in writing, within 20 days of the date of this Order, what steps Respondent has taken to comply herewith.

<sup>7</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

<sup>8</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>9</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."